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INTEROFFICE MEMO

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**DATE:** 8/2/2004  
**TO:** THE BOARD OF SELECTMEN  
**FROM:** JOHN MURRAY  
**RE:** THE STATE ETHICS COMMISSION'S OPINION AS TO MUNICIPAL BONDS

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Attached is a copy of the opinion of the legal division of the State Ethics Commission as it related to the retail sale of municipal bonds. As you will note from the highlighted section on page 3 of the Opinion, the legal division took the position that any board or committee "participating in *any* activities of the" Board of Selectmen were banned from participating.

When I spoke with Mr. Popov concerning obtaining permission for the public dissemination of his letter, he volunteered that he believed this was narrow reading, but he was confined by the law because it did not have a carve out for municipal bond issues. Is the Board interested in requesting an amendment to the Ethics Law allowing those not directly involved in determination of the specifics of the bonds, the project or obtaining Town Meeting approval of the bonding to purchase municipal bonds of their community? I believe it will enlarge the market and would have made a difference in how many bonds we sold.

**Commonwealth of Massachusetts**  
**STATE ETHICS COMMISSION**

John W. McCormack Office Building - One Ashburton Place - Room 619  
Boston, Massachusetts 02108-1501

PHONE: 617-727-0060 or 888-485-4766 FAX: 617-723-5851

[www.state.gov/ethics](http://www.state.gov/ethics)

September 23, 2004

**CONFIDENTIAL**

Stephen D. Anderson, Esq.  
Anderson & Kreiger LLP  
43 Thorndike Street  
Cambridge, MA 02141-1764

Dear Mr. Anderson:

I am writing in response to your request for advice under the conflict of interest law, G. L. c. 268A. I apologize for the delay in providing you written advice. The following is based upon your written request and my telephone conversation with Daniel Hill, from your office, on September 16, 2004.<sup>1</sup> You are seeking advice on behalf of employees of the Town of Acton in your capacity as Town Counsel.

**Question**

You ask how the conflict of interest law will apply to municipal employees of the Town if they wish to purchase bonds issued by the Town.

**Short Answer**

Municipal employees must comply with § 20 of G. L. c. 268A, described in detail below. Some may be able to qualify for the § 20(b) exemption, others who are special municipal employees may be able to qualify for the §§ 20(c) or 20(d) exemptions. If the employees cannot qualify for an exemption, they may not purchase the bonds.

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<sup>1</sup> Although you are entitled to receive a formal opinion issued by the Commissioners of the Ethics Commission if you believe one is necessary or desirable, this informal advice from the Legal Division of the Commission is based upon relevant Commission precedent. In addition, this opinion "shall be binding on the Commission in any subsequent proceedings concerning the person who requested the opinion and who acted in good faith, unless material facts were omitted or misstated by the person in the request for an opinion." G. L. c. 268B, § 3(g).

Please also note that the Legal Division of the Ethics Commission provides only prospective guidance under the conflict of interest law, and this informal opinion is not intended to address or evaluate the propriety of conduct that has already occurred or the applicability or effect of any other body of law or regulation about such conduct. Only the Enforcement Division of the Ethics Commission, a District Attorney, or the Attorney General can address issues raised by past conduct.

Next, in their capacity as municipal employees, they must not participate<sup>8</sup> in or have official responsibility<sup>9</sup> for *any* of the activities of the "contracting agency". Further, the Town agency that employs the municipal employee must not "regulate the activities of the contracting agency." Next, the contract must either be "made after public notice" or competitively bid. Finally, if the municipal employees meet all of these criteria, they must file a written disclosure of their financial interest in the contract with the Town Clerk, describing their, and their immediate family's, interest in the municipal contract.

Here, we assume that the bond issue will be made after public notice. Based on your description of the roles of various municipal officials, the Town Manager, Town Treasurer and the members of the Board of Selectmen **will not** qualify for the § 20(b) exemption because of their official roles and involvement with respect to the "contracting agency." If the Town Assessor and or members of the IT department also participate in any activities of the contracting agency because of their work on the bond issue, they also will not qualify for the § 20(b) exemption.

The phrase "participate in or have official responsibility for *any* of the activities of the contracting agency"<sup>10</sup> has been interpreted by the Ethics Commission to impose significant restrictions upon municipal employees' ability to have additional financial interests in municipal contracts.<sup>11</sup> As you know, the Ethics Commission has narrowly interpreted exemptions to prohibitions in these areas of the conflict of interest law because of the potential for municipal officials to obtain unfair advantages from, and/or exert undue influence over, municipal agencies with which they have personal contractual/financial interests.

Thus, it is possible that the Town Accountant and/or the Assistant Town Accountant will also **not** be able to qualify for the § 20(b) exemption. As municipal employees if they participate in or have official responsibility for *some* activities of the contracting agency---the Board of Selectmen---or they are employed by the contracting agency, then § 20(b) will not be available to them. We do not, however, has sufficient facts to determine their official relationships with the contracting agency. We recommend, therefore, that you closely review these relationships to determine their eligibility.

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<sup>8</sup> "Participate, participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise." G. L. c. 268A, § 1(j).

<sup>9</sup> "Official responsibility, the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action." G. L. c. 268A, § 1(i).

<sup>10</sup> Emphasis added.

<sup>11</sup> See e.g., EC-COI-99-2.

By contrast, members of the School Committee, School Administration and members of the Financial Committee are not employed by the "contracting agency" and are not employed by an agency that regulates the activities of the contracting agency. In most cases, these individuals do not participate in or have official responsibility for any activities of the contracting agency.

For those municipal employees who hold only "special municipal employee" positions, they may seek to qualify for exemptions under §§ 20(c) or 20(d). A special municipal employee who, in his current position, either participates in, or has official responsibility for any of the activities of the contracting agency must obtain the approval of the Board of Selectmen to have the financial interest in the contract **and** he must file a disclosure with the Town Clerk describing the financial interest.<sup>12</sup> By contrast, if the special municipal employee does not participate in and does not have official responsibility for any activities of the contracting agency, he must only file a written disclosure with the Town Clerk, again describing the financial interest in the relevant contract.<sup>13</sup>

I hope that this advice is helpful.<sup>14</sup> If I can be of further assistance, please do not hesitate to call me.<sup>15</sup>

Sincerely,



Christopher N. Popov  
Senior Staff Counsel  
Legal Division

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<sup>12</sup> G. L. c. 268A, § 20(d).

<sup>13</sup> G. L. c. 268A, § 20(c).

<sup>14</sup> The Ethics Commission may not disclose your identity or any other identifying information about your request without your consent. You, however, may disclose this advice to anyone, but if you publicly disclose that you have requested or received advice from the Commission, the Commission may determine, after reviewing the specific circumstances, that you have consented to our making the full text of this letter available to the public. See G. L. c. 268B, § 3(g); 930 Code Mass. Regs. § 3.01(8).

<sup>15</sup> Please also note that you may obtain general information and guidance from the Commission's web site, [www.mass.gov/ethics](http://www.mass.gov/ethics).